ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LEO DUWAYNE ACKLEY,
Defendant-Appellant.

/

Supreme Court No. 149479
Court of Appeals No. 318303
Circuit Court No. 2011-003642-FC

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

Defendant applies for leave to appeal from the April 22, 2014, unpublished opinion of the Michigan Court of Appeals reversing the trial court's grant of a new trial. *People v Ackley*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 318303). The People filed a brief in opposition. This Court, in its order dated November 26, 2014, then desired the parties to file supplemental briefs addressing the question of whether Defendant was denied effective assistance of counsel as a result of trial counsel's investigation of the possibility of obtaining an expert witness. For the reasons stated in this supplemental brief, the People believe trial counsel was not ineffective, and ask this Court to deny Defendant's application for leave.

COUNTER-STATEMENT OF QUESTIONS

I. WHETHER THERE IS ANYHING ABOUT DEFENSE COUNSEL'S INVESTIGATION OR USE OF AN EXPERT WITNESS IN THIS CASE THAT WARRANTS REVIEW BY THIS COURT?

The Court of Appeals answered: No.

The trial court answered: Yes.

Defendant-Appellee answers: Yes.

Plaintiff-Appellee answers: No.

COUNTER-STATEMENT OF FACTS

The People incorporate by reference the counter-statement of facts included with their initial brief against Defendant's application for leave to appeal. Any additional facts will be set forth below as they relate to this particular issue.

ARGUMENT

I. THERE IS NOTHING ABOUT DEFENSE COUNSEL'S INVESTIGATION OR USE OF AN EXPERT WITNESS IN THIS CASE THAT WARRANTS REVIEW BY THIS COURT

Standard of Review:

The People incorporate by reference the standard of review section filed with their initial brief in opposition to Defendant's application for leave to appeal.

Discussion:

This case can be—and indeed, should be—seen as a common or garden variety ineffective assistance of counsel case. The Court of Appeals viewed it that way, and resolved it using long-standing precedent. See *Ackley*, Appendix A,[1] at 4. There is no compelling reason for this Court to see the case in any other way. As a result, there is no clear error in the Court of Appeals decision, nor is there any conflict between the Court of Appeals decision in this case and other decisions of that court or with this Court's precedents. MCR 7.302(B)(5). To the extent that there might be an issue of significance to the jurisprudence of the state lurking in these facts, MCR 7.302(B)(3), it could only be the question of when an attorney can reasonably stop shopping for potential expert witnesses. As a practical matter, this becomes a question of whether an attorney *must* have an expert witness testify at trial or be found ineffective. However, as will be demonstrated below, this issue was already correctly addressed by the Court of Appeals using already-existing precedents.

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[1] *People v Ackley*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 318303). A copy of the opinion was attached to the People's initial brief against Defendant's application for leave to appeal as Appendix A, and is incorporated herein by reference.

It is very important to understand that the question put at issue in this Court's November 26, 2014 order is not whether trial counsel was ineffective because he failed to investigate the possibility of obtaining an expert. Defense counsel investigated. More than that, he retained an expert, and used that expert's services to develop an effective cross examination of the People's expert witnesses. GIV[2] at 60 (judge acknowledging that Mr. Marks vigorously cross-examined the People's experts). Instead, the question we must address here is when does a reasonable attorney get to *stop* investigating? Is a reasonable attorney required to keep shopping for experts until he finds one who will say anything necessary to help the defendant?

A. How thorough is a thorough investigation?

This Court's request for supplemental briefing is—boiled down to its essence—a request for a definition of a thorough investigation and reasonable professional judgment. The answer to this question is found in already existing precedent. Indeed, the United States Supreme Court stated, in *Strickland*, that the duty to investigate a possible avenue of defense "requires no special amplification." *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). As a practical matter, a trial attorney's investigation and exercise of professional judgment will not be ineffective if he has a reasoned basis for his decisions. It has been well-settled law since the *Strickland* decision that an attorney's:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. [*Strickland*, 466 US at 690-91.]

Digging into trial counsel's decisions to hire, or not to hire, particular expert witnesses is exactly the sort of examination that is prohibited by the ineffective assistance case law, from *Strickland*

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[2] Continued *Ginther* Hearing, dated September 6, 2013, referred to as GIV.

up to the Supreme Court's recent decision in *Hinton v Alabama*, __ US __; 134 S Ct 1081; 188 L Ed 2d 1 (2014).

It is worth focusing on the language of *Hinton*: "We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Hinton*, 134 S Ct at 1089. Mr. Marks retained one expert; requiring him to continue shopping for experts, simply because he received an unfavorable opinion from the first one he contacted, represents a descent into hindsight analysis and the substitution of the appellate courts' judgment for that of trial counsel's. That path is prohibited by a long line of cases, both at the federal and Michigan levels. See, e.g., *Harrington v Richter*, 562 US 86; 131 S Ct 770, 789; 178 L Ed 2d 624 (2011); *Strickland, supra* at 689; *People v Grant*, 470 Mich 477, 485; 684 NW 2d 686 (2004). More specifically, Michigan courts have recognized that this principle means trial attorneys will not be ineffective if they have a reasonable basis to stop seeking an expert witness. *People v Eliason*, 300 Mich App 293, 300; 833 NW2d 357 (2013) (counsel was not ineffective when he stopped consulting experts after receiving unfavorable opinions).

Defendant is asking this Court for a rule that—contrary to this established precedent—would require trial counsel to continue shopping for experts if the first one gives him an unfavorable opinion. It would also require counsel to offer expert testimony at trial to rebut experts presented by the People, regardless of the strategic choices counsel thinks wisest. Just as significant, Defendant is asking this Court to ignore Mr. Marks' overall performance in representing Defendant, and focus only on the narrow question of whether he hired a particular expert witness.

When the case law is applied to the facts of the instant case, the obvious conclusion is that Mr. Marks made a reasonable strategic choice based on the information available to him. In

preparing for Defendant's trial, Mr. Marks consulted his expert witness, who told him—in fairly direct terms—that the interpretation of the forensic evidence by the People's experts was correct. GIV at 61 (court summarizing Dr. Hunter's advice to Marks as, "It's homicide."). Marks had no reason to believe that Dr. Hunter's professional opinion was incorrect, or that consulting further experts would be valuable.[3] Mr. Marks decided to develop a strategy based on what his trusted expert concluded about the facts of the case. During the trial, Marks vigorously cross examined the People's experts, and obtained useful admissions from at least one of them. See *People v Ackley*, Appendix A at 6; GIV at 60. His representation of Defendant at trial was dynamic, competent, and effective, and there is no need for appellate review beyond that already provided by the Court of Appeals.

B. The Supreme Court decision in *Hinton v Alabama* supports the People's position.

The United States Supreme Court recently decided *Hinton v Alabama*, in which the Court found ineffective assistance in trial counsel's decisions regarding the hiring of an expert witness. *Hinton*, 134 S Ct 1081. No changes were made to established precedent in this case: the *Hinton* Court called the decision a "straightforward application" of the standard *Strickland* analysis for ineffective assistance claims. *Id.* at 1087. Nevertheless, *Hinton* provides useful guidance for courts considering whether a defense attorney's choice of expert witness constitutes ineffective assistance.

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[3] See Appendix A at 4 for the Court of Appeals discussion of this point. It is true Dr. Hunter mentioned the name of at least one other potential expert in the field, for use *if testimony was desired.* The testimony at the *Ginther* hearing made very clear that Dr. Hunter did not believe that another expert was needed in order to develop a better analysis of the facts. Nor did Mr. Marks believe Dr. Hunter to be telling him to consult other experts for a better analysis of the facts. For a more thorough discussion of this issue, see People's initial brief against Defendant's application for leave to appeal, Section I.A.2 & 3.

1. *Hinton* makes clear that courts do not inquire into counsel's choice of experts.

The central fact on which the Supreme Court based its decision that trial counsel in *Hinton* had been ineffective was that counsel made an important mistake of law. To quote the Court: "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Id.* at 1089. That mistake led counsel to retain and use an expert witness who counsel knew was inadequate. *Id.* at 1085. Worse still, the trial court had specifically invited counsel to apply for more funds if he thought it necessary; counsel failed to do so. *Id.* at 1088. The issue was not counsel's choice of expert witness, on its own, but rather the underlying failure to know or investigate the law.[4]

The *Hinton* Court made this explicit when it explained that appellate courts should not be delving into which experts trial counsel chooses to use. "We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Id.* at 1089. In fact, so long as counsel's choice of experts is reasonable at a very basic level, an ineffective assistance argument is guaranteed to fail. "The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.'" *Id.* at 1089 (quoting *Strickland*). That fundamental point is directly relevant to the instant case, because the heart of Defendant's ineffective assistance claim is not that his trial counsel, Mr. Marks, was mistaken about the law, but that he hired the wrong expert.

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[4] *Hinton* is recent enough that there are few decisions applying it. Those that exist have made clear that the basis of the decision was counsel's mistake of law, rather than his choice of expert witness or his trial strategy. See, e.g., *Mendoza v Secy, Florida Dept of Corr*, 761 F3d 1213, 1238 (CA 11 2014) (ineffective assistance in *Hinton* was based on attorney's mistake of law); *Lawlor v Davis*, 764 SE2d 265, 277-78 (Va 2014).

2. Applying *Hinton* to this case.

The key facts in *Hinton* were that the defendant's attorney mistakenly thought Alabama law limited the amount of money he could use to retain an expert witness, and—as a result—went to trial with an expert witness that everyone, including counsel, felt was inadequate for the task. *Id.* at 1089. In fact, the expert counsel used was of such low quality that he was affirmatively not recommended by other lawyers trial counsel contacted. *Id.* at 1085. Nevertheless, counsel went to trial with this expert because he was the only one willing to get involved with the case for the amount of money counsel mistakenly thought was available. *Id.* Hinton's attorney testified that he wanted a better expert, but could not get one for the amount of money he believed he was entitled to use. *Id.* The Supreme Court found the underlying mistake of law (and failure to properly investigate the law) to be ineffective assistance, and remanded for a determination of whether the prejudice prong of the *Strickland* analysis had been met.[5]

Compare the situation in *Hinton* with the facts of this case. Mr. Marks sought funds from the court and used them to retain a well-respected expert witness, who gave him an analysis of the case. The expert Marks retained was Dr. Hunter, who has testified as an expert witness in pathology and forensic pathology on many occasions in Michigan courts. GIII[6] at 4-5. Dr. Hunter was recommended to Mr. Marks by a member of the local defense bar, who had used him

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[5] On remand, trial counsel's error in *Hinton* was found to have prejudiced the defense. See *Hinton v State*, __ So3d __ (Ala Crim App 2014) (available at 2014 WL 6608067). That is not a surprising outcome, given the facts. As regards this case, the Court of Appeals opinion contains a thorough evaluation of the prejudice prong of the *Strickland* analysis. Of particular relevance to this supplemental brief is the discussion of the likely outcome if counsel had obtained testimony from Dr. Spitz. See Appendix A at 5-6. See also People's initial brief against Defendant's application for leave to appeal, Section I.B.

[6] Continued *Ginther* hearing transcript, dated August 8, 2013, referred to as GIII.

in a trial and was pleased with the results. GI[7] at 53. In short, Dr. Hunter was highly qualified, and well-regarded. This is in marked contrast with the situation in *Hinton*, in which counsel felt constrained to use an expert who was widely considered ineffective. Just as important, Mr. Marks received good value from retaining Dr. Hunter, despite Dr. Hunter's considered opinion that Victim's death was the result of child abuse.[8] Again, this is in marked contrast with *Hinton*, in which the unqualified expert turned into a significant liability at trial. See *Hinton*, 134 S Ct at 1085-86 (noting that the prosecutor "badly discredited" the expert).

Most importantly, Mr. Marks made a reasonable strategic decision—to develop a cross examination rather than offer expert testimony—based on the conclusion he received from the expert he retained. The decision Mr. Marks made was not driven by a mistake of law, as in *Hinton*, but because he relied on advice from a well-qualified professional, and because he did not think the trial judge would approve more money "to shop around for someone who would say it was accidental." GI at 59. That belief was reasonable under the circumstances.[9] Trial counsel is allowed to formulate a trial strategy that uses his limited available resources in accord with effective trial tactics. *Harrington v Richter*, 562 US 86; 131 S Ct 770, 789; 178 L Ed 2d 624

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[7] *Ginther* hearing transcript, dated June 24, 2013, referred to as GI.

[8] Mr. Marks consulted with Dr. Hunter to develop his cross examination of the People's experts. See People's initial brief against Defendant's application for leave to appeal, Sections I.A.1 & 2, for a more detailed discussion of counsel's strategic decisions.

[9] See People's initial brief against Defendant's application for leave to appeal, Section I.A.3, for a more detailed discussion of whether Mr. Marks could have received more funds. Even if Marks was mistaken regarding whether the trial judge would have given him more funds, as the judge running the *Ginther* hearing concluded, this represents a mistake of fact, rather than of law. And, of course, the entire conclusion that the trial judge would have awarded more money represents a hindsight analysis of the type entirely precluded in ineffective assistance analyses. This sort of "reliance on the harsh light of hindsight . . . is precisely what *Strickland* . . . seek[s] to prevent." *Harrington v Richter*, 562 US 86; 131 S Ct 770, 789; 178 L Ed 2d 624 (2011).

(2011). That is exactly what counsel did in this case. See also *People v Ross*, 119 AD3d 964; 990 NYS2d 265 (2014) (in light of *Hinton*, trial counsel's decision to cross examine prosecution experts, rather than call expert witnesses of his own, was not ineffective). Mr. Marks did not make his strategic choice because he was mistaken about the funds legally available to him. As a result, he did not fail to adequately investigate obtaining expert testimony for Defendant's case. Defendant's ineffective assistance claim fails.

Conclusion:

As was demonstrated above, the Court of Appeals ruling was in accord with existing case law, both from Michigan and the United States Supreme Court. There is no conflict of precedent that this Court could resolve. For the same reason, the Court of Appeals decision was not in error. MCR 7.302 (B)(5). This case is an ordinary ineffective assistance case, resolved by the Court of Appeals using well understood legal principles. Nor is there any issue of significance to the jurisprudence of the state involved, because existing precedent already fully resolves the issue of how appellate courts should review decisions about expert witnesses by trial counsel. MCR 7.302(B)(3). In fact, a finding to the contrary would upend decades of long-established precedent.

Such a ruling—that Mr. Marks was ineffective in his investigation and use of expert witnesses—would mean that an attorney *must* continue to interview experts until he finds one willing to testify favorably for his client, however much plausibility gets stretched in the process. It will no longer be enough for counsel to use an expert solely to develop a cross examination strategy, or to increase his own understanding of the People's evidence and theory of the case. Mr. Marks did those things for Defendant, with real effect. Nor will counsel be able to rely on the actual expertise of the expert he retains, if the expert's professional opinion is unfavorable to

his client. If Mr. Marks' choices are found to constitute ineffective assistance of counsel, then the current rule—that an attorney can use his or her judgment to decide how to investigate and present a defense—will be turned on its head. All defense attorneys will need to find a testifying expert witness. How could they not? This will not benefit the court system's truth-seeking function, nor aid in the quest for justice. It will be a boon to whole categories of expert witnesses, however.

As a result, there is nothing about the way Mr. Marks investigated the potential uses of expert testimony in Defendant's case that warrants this Court granting leave to appeal. Defendant's application should be denied in its entirety.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee, the People of the State of Michigan, respectfully request that this Honorable Court deny Defendant-Appellant's request for relief.

Respectfully submitted,

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Calhoun County Prosecuting Attorney

DATED: January 6, 2015

By: Marc Crotteau

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PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF CALHOUN)

Tina M. Mahoney, being first duly sworn, deposes and states that on **this** 6th **day of January 2015**, she served a copy of the **Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal and a Proof of Service** upon Mr. Andrew J. Rodenhouse, Attorney for Defendant-Appellant, by mailing each of the said documents in an envelope bearing first-class postage, fully prepaid, at his address of record, as stated above.

Further, deponent saith not.

Tina M. Mahoney

Tina M. Mahoney, Deponent

Subscribed and sworn to before me **this** 6th **day of January 2015.**

Amy Mandoka

Amy Mandoka, Notary Public
Calhoun County, Michigan
My commission expires: 08-26-2019

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January 5, 2015

Clerk of the Michigan Supreme Court
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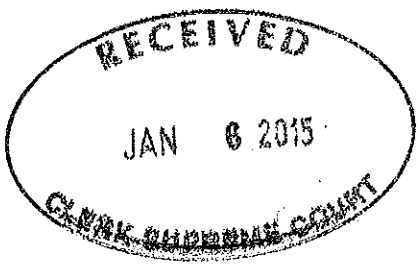
RE: PEOPLE v LEO DUWAYNE ACKLEY
Supreme Court No. 149479
Court of Appeals No. 318303
37th Circuit Court No. 2011-003642-FC

Dear Clerk:

Enclosed for filing with the Court is the original and seven (7) copies of the Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal and a Proof of Service regarding the above-captioned case. A copy of each document has been mailed under copy of this letter to Mr. Andrew J. Rodenhouse, Attorney for Defendant-Appellant, pursuant to the terms of the Proof of Service.

Please do not hesitate to contact me if you have any questions or concerns regarding this matter. Thank you for your time and consideration.



Sincerely,

Tina M. Mahoney

Tina M. Mahoney
Appellate Paralegal

Enclosures

cc: Mr. Andrew J. Rodenhouse, Attorney for Defendant-Appellant